Office - Supreme Court, U.S.
FILED
APR 22 1957
JOHN T. [illegible]EY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

DAVID VON G. ALBRECHT,
DAVID P. SIEGEL,
O. JOHN ROGGE,
Attorneys for Petitioners.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT CONCERNING SCOPE OF REVIEW	1
ARGUMENT	2
I. 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, is not confined, nor does it even refer, to "hard-core" pornography. Concededly, the matter for which petitioner was convicted is not of that quality. Accordingly, the government's argument is almost entirely devoted to the defense of a conviction based on a statute and a state of facts not here present	2
II. 18 U. S. C. §1461 is in violation of the first, ninth and tenth amendments	6
A. The framers of the federal bill of rights intended no exception for obscenity from the first amendment's sweeping command that "Congress shall make no law"	7
B. This court should decline the novel role, offered by the government, to develop a catalogue of values by which to measure the respective rights of expressions to the protection of the first amendment	14
C. The government has the burden of showing both what the substantive evil was and that the danger of it was so clear and immediate or probable as to justify suppression of the publications in question	15
D. Exclusion of the federal government from the area of obscenity, pursuant to the first, ninth and tenth amendments, would not "open the gates wide" (Br. 39) as the government suggests, but would leave the subject with the states where it belongs under the constitution	18

PAGE

III. The concept of obscenity is not sufficiently definite so that one can tell with reasonable certainty whether one is violating a statute proscribing it 21

Conclusion 23

Authorities Cited

Cases

Abrams v. United States, 250 U. S. 616, 630 (1919) 13
Attorney General v. Book Named God's Little Acre, 326 Mass. 281, 93 N.E. 2d 819 (1950) 22
Beauharnais v. People, 343 U. S. 250, 288 (1952) .. 14, 18
Commonwealth v. Gordon, 66 Pa. D. & C. 101 (1949), aff'd, 166 Pa. Sup. 120 22
Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E. 2d 840 (1945) 22
Commonwealth v. Sharpless, 2 S. & R. (Pa.) 91 7
Dennis v. United States, 341 U. S. 494 (1951) 6, 15, 16
Doubleday & Co. v. People, 335 U. S. 848 (1948), aff'g 297 N. Y. 689, 77 N.E. 2d 6 (1947) 22
Gitlow v. New York, 268 U. S. 652 (1952) 6, 18
James Clark Distilling Co. v. Western Maryland, 242 U. S. 311 (1917) 20
Palko v. Connecticut, 302 U. S. 319, 323-325 (1937) . 18
People v. Viking Press, 147 Misc. 813, 264 N. Y. S. 534 (1933) 22
Schenck v. United States, 249 U. S. 47, 52 (1919) ..6, 15, 16
Sunshine Book Co. v. McCaffrey, 112 N. Y. S. 2d 476 (1952) 21
Sunshine Book Company v. Summerfield, C.A. 3007-53, July 13, 1953 aff'd 221 F. 2d 42 (D.C. Cir. 1954) cert. denied, 349 U. S. 921 (1955) 21

PAGE

Sunshine Book Company v. Summerfield, 128 F. Supp. 564 (1955), reversed on appeal, (C.A.D.C. No. 12622, May 31, 1956) 21

Thomas v. Collins, 32 U. S. 516 (1945) 21

West Virginia State Board of Education v. Barnette, 319 U. S. 624, 642 (1943) 21

United States Constitution

First Amendment ..... 1-2 *passim*
Fifth Amendment ..... 1-2 *passim*
Ninth Amendment ..... 1-2 *passim*
Tenth Amendment ..... 1-2 *passim*

Statutes

Act of 1711 of Massachusetts Bay Colony 8
Act of July 2, 1836 §32, 5 Stat. 87 19
Sedition Act of 1798 8
Smith Act 16
18 U.S.C. §1461, 62 Stat. 768, 69 Stat. 183 ..... 1, 2 *passim*

Other Authorities

Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40 (1938) 7

Brandt, James Madison Father of the Constitution, 452-471 (1950) 13

Erskine Caldwell's God's Little Acre 21

Prof. Walter Gellhorn, Individual Freedom and Governmental Restraints (1956) 7, 16, 17, 22

Grant and Angoff, Massachusetts and Censorship, 10 B. U. L. Rev. 36, 52 (1930); Note, 52 Mich. L. Rev. 575, 576 (1954) 8

Anne L. Haight, Banned Books (2nd ed.; Bowker, 1955) 22

Hawkins, 2 Pleas of the Crown 7

PAGE

Jahoda, The Impact of Literature: A Psychological Discussion of Some Assumption in the Censorship Debate, 37-40 (1954) 17

Jefferson, Letter of September 11, 1804 to Mrs. John (Abigail) Adams 12

10 The Works of Thomas Jefferson, 89-90, 133-135 (Fed. ed. 1905) 12

8 The Writings of Thomas Jefferson, 311 (Ford ed. 1897) 12

Dr. Benjamin Karpman, The Sexual Offender and His Offenses (1954) 17

Lasswell, Censorship, 3 Encyc. Soc. Sci. 290, 293 (1944 ed.) 8

Madison, Address of the General Assembly to the People of the Common Wealth of Virginia on the Virginia Resolutions of 1798 9

4 Memoir, Correspondence, and Miscellanies from the Papers of Thomas Jefferson, 27 (Randolph ed. 1829) 12

Miller, Crisis in Freedom, 168-169 (1951) 13

Nye, Fettered Freedom, 69 (1949) 20

Report on the Resolutions of 1798 10

Rogge, Compelling the Testimony of Political Deviants, 55 Mich. L. Rev. 375, 405-406 (1957) 4

Schachner, Founding Fathers, 447-468 (1954) 13

Smith, Freedom's Fetters, 131-155 (1956) 13

Taylor, An Inquiry Into the Principles and Policy of the Government of the United States (New Haven, 1950) 13

President Woodrow Wilson, 3 History of the American People 14

IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner.

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

Counter-Statement Concerning Scope of Review

The government suggests: "Under the limited grant of certiorari, it is to be taken as given that the material to which the statute was construed to apply is likely to corrupt the morals of the average member of the community" (Br. 96). We challenge this statement. Although the Court limited review to the three questions considered in our brief, the court did not limit the consideration of those questions. The review in this case is nothing less than the constitutionality of the federal obscenity statute, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, under the First.

Fifth, Ninth and Tenth Amendments. Such review includes consideration of the constitutionality of this statute not only on its face but also as applied. Indeed, the government concedes this at one point (Br. 16). Such a consideration of this statute involves questions of the substantive evil which Congress sought to prevent and whether there was a reasonable probability that petitioner's publications would bring about this evil. If there was no proof as to any substantive evil and no proof that petitioner's publications would probably bring about this substantive evil then the case should never have gone to the jury.

ARGUMENT

I.

18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, Is Not Confined, Nor Does It Even Refer, to "Hard-Core" Pornography. Concededly, the Matter for Which Petitioner Was Convicted Is Not of That Quality. Accordingly, the Government's Argument Is Almost Entirely Devoted to the Defense of a Conviction Based on a Statute and a State of Facts Not Here Present.

Briefly stated, the government contends no more than that a federal criminal statute aimed at "hard-core" pornography carried in the United States mails is valid. The current state of our law, mores and thought concerning freedom of expression would allow little more room even for the most ardent advocate. The emphasis upon "hard-core" pornography is an admission that a federal criminal statute dealing with something substantially less virulent

would be incapable of constitutional justification in the face of the realistic material which is now accepted in literature and the other arts as regular fare.

Unfortunately for the government, however, the statute it defends is not authored by the able and enlightened writers of its brief to this Court, but by Anthony Comstock.[1] Not surprisingly, then, 18 U. S. C. §1461 makes no reference to pornography, "hard-core" of otherwise. Instead the statute deals with "obscene, lewd, lascivious, or filthy" matter. By its terms, at least, 18 U. S. C. §1461 covers far more ground than the government is prepared to defend.

If legislative intent be probed to supply that limitation which the statute does not, it must be immediately recalled that 18 U. S. C. §1461 is our legacy from Comstock. None would dare to suggest that Comstock, who drafted and secured the passage of 18 U. S. C. §1461, intended to confine it to "hard-core" pornography. Indeed, Comstock would probably disown and denounce the government's efforts to revise by construction his section. The government's current reading of 18 U. S. C. §1461 warrants the reminder that:

> ". . . no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature" [Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947)].

---

[1] We seriously doubt whether material such as appears at p. 63 of the government's brief would have been deemed consonant with the spirit of 18 U.S.C. §1461 by Comstock.

Nor do the facts in this case bring 18 U. S. C. §1461, as here applied, within the field of "hard-core" pornography upon which the government wishes to base its effort. The government admits petitioner's publications are in the "borderline entertainment area" (Br. 36) and do not contain that blatant, commercial, "black-market" pornography (Br. 37) which is said to be the principal objective of those enforcing 18 U. S. C. §1461. That 90% of the offenders of 18 U. S. C. §1461 are of the "hard-core" pornography[2] variety is of little solace to petitioner, who is under the harsh sentence of five years plus a fine of $5,000.00, though he did not deal in such matter, and of no aid to this Court confronted with a statute not confined to pornography in a case where no pornography was purveyed.[3]

The government, inverting the old Blackstone dictum, would sustain the statute and the conviction here on the theory that better one man innocent of dealing in pornography be convicted than nine men guilty thereof escape. It is sufficient for the government that petitioner, in its

---

[2] This figure is claimed by the government in its brief here but not substantiated in the record or any other published source referred to in the brief.

The government also points out that a large number of defendants indicted under 18 U.S.C. §1461 pleaded guilty. (Br. 34 n.22). This observation has no significance: most defendants in federal criminal cases plead either guilty or *nolo contendere*. See Rogge, *Compelling The Testimony of Political Deviants*; 55 Mich. L. Rev. 375, 405-406 (1957).

[3] In yet another respect the government has directed its argument to an issue not here presented. Thus the government suggests that petitioner's circulars and advertisements invaded the privacy and offended the sensibilities of recipients who did not order or desire to receive that matter (Br. 8, 9-10, 60-63). Of course, 18 U.S.C. §1461 does not expressly refer, nor is it confined, to unsolicited literature.

view, comes with the aura of the "hard-core" of pornography. In this manner the government vividly confirms the dangers of judicial legislation, particularly in the area of criminal penalties for First Amendment activities. In that area the rule is that the statute must be narrowly and directly confined to the evil as to which legislative competency obtains. (See authorities at pp. 39-40 of Pet. Br.) The government can constitutionally justify 18 U. S. C. §1461 only by the flagrant violation of that rule, *i.e.*, by urging that 18 U. S. C. §1461 covers the aural extensions of "hard-core" pornography, for only by such argument can the government hope to bring this case within the only area even capable of defense.

Almost in its entirety, the reasoning of the government's brief is based upon the consequences of exigency and power flowing from the transmission of pornography through the mails. Even on its chosen premise we think the government wrong. But, even more importantly at this point, at the outset we must, almost forcibly, remove this case from the posture in which it has been posed by the government in 125 pages of brief-writing. Neither the statute nor the facts deal with pornography. As a consequence, we start here by re-posing the case in terms of the questions presented as to which certiorari was granted (352 U. S. 964): does the federal *obscenity* statute, 18 U. S. C. §1461, violate the First, Fifth, Ninth and Tenth Amendments? While the government has submitted an able and even eloquent brief to sustain some future act dealing only with "hard-core" pornography, it has failed almost completely to direct any argument to the questions presented by the writ.

II.

18 U. S. C. §1461 Is In Violation of the First, Ninth and Tenth Amendments.

We argued in our main brief that under the First Amendment expression is free, particularly where the only interest threatened by expression is the morality or peace of a locality which is exclusively the subject of local jurisdiction under the Ninth and Tenth Amendments. We recognized, of course, that where expression is tantamount to action cognizable by federal power, then the power over the action extends to the expression. In this view expression remains free, only action or expression to the extent that it is equivalent to action is the subject of governmental restraint. Differences exist as to how close speech must be to action before it can be treated as action: the "reasonable tendency" [*Gitlow* v. *New York*, 268 U. S. 652 (1925)] clear and present danger [*Schenck* v. *United States*, 249 U. S. 47, 52 (1919)] and clear and probable danger [*Dennis* v. *United States*, 341 U. S. 494 (1951)] tests are among those which have been employed by this Court. But none of these tests denies that the First Amendment guarantees expression freedom from federal power; the only inquiry in the cases is whether the expression is sufficiently closely related to action amenable to governmental power.

Since 18 U. S. C. §1461 punishes expression without regard to its relation to action subject to federal power, the government must and does contend that some expression is historically and inherently entitled to little or no First Amendment protection irrespective of whether the expres-

sion is related to or was productive of action within the scope of the Congress. We think the government to be in error on both scores.

A.

The Framers of the Federal Bill of Rights Intended No Exception for Obscenity from the First Amendment's Sweeping Command That "Congress Shall Make No Law."

There was no established common law crime of obscenity at the time of the adoption of the First Amendment. As late as 1795 the great Hawkins remarked in *2 Pleas of the Crown*:

> "* * * a writing full of obscene ribaldry, without any kind of reflection upon any one, is not punishable as I have heard agreed in the Court of King's Bench." At 130.

Alpert, in *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1938) wrote that until the end of the 18th century there was no definition of the term obscenity and continued

> "There is no basis of identification * * * there is little more than the ability to smell it." At 47.

More recently Professor Walter Gellhorn in his book *Individual Freedom and Governmental Restraints* (1956) stated that "the English obscenity law dates only from 1857, in the Victorian era, and the United States statutory framework began to be built only in 1873, when Congress was overcome by Anthony Comstock". At 99.

The first reported case in this country on obscenity was decided in 1815. *Commonwealth* v. *Sharpless*, 2 S. & R.

(Pa.) 91. See also Grant and Angoff, *Massachusetts and Censorship*, 10 B. U. L. Rev. 36, 52 (1930); Note, 52 Mich. L. Rev. 575, 576 (1954). And it was not until 1821 that state legislation on the subject began to occur. Lasswell, *Censorship*, 3 Encyc. Soc. Sci. 290, 293 (1944 ed.).[4]

The historical evidence offered by the government is not to the contrary. Restraints by Washington on profanity in the army (Br. 21-22) we may put aside if for no other reason than that the discipline required for soldiers is no precedent for the treatment of civilians in a democracy. Moreover, the early state action dealing with profanity, or even blasphemy in public, recited by the government (Br. 22-25), is not relevant to the problem of obscenity any more than legislation against indecent exposure in public is relevant to alleged obscenity in publications which must be purchased to be seen.

Moreover, even in those cases where speech constituted an offense, as, in libel, the framers intended no exception under the First Amendment to the ban of federal power. Both James Madison, generally known as the father of the Constitution and the principal draftsman of the first Ten Amendments, and Thomas Jefferson specifically said so. This was the basis for their objection to the Sedition Act of 1798. Madison demolished the two arguments offered in support of the Sedition Act of 1798: that Congress had power to punish crimes under the common law of England, and that the First Amendment nevertheless allowed Congress to punish the licentiousness of the press.

[4] The Act of 1711 of Massachusetts Bay Colony, to which the government refers (Br. 24), when carefully read is seen to relate to blasphemy and not to obscenity.

He took the position that the federal government was without any authority whatsoever for shielding its officers against libelous attack. If federal officials were libeled they could sue in the same state courts as their fellow citizens. In 1799 Madison in his *Address of the General Assembly to the People of the Common Wealth of Virginia* on the Virginia Resolutions of 1798 argued:

> "* * * Every libellous writing or expression might receive its punishment in the State courts, from juries summoned by an officer, who does not receive his appointment from the President, and is under no influence to court the pleasure of Government, whether it injured public officers, or private citizens. Nor is there any distinction in the Constitution empowering Congress exclusively to punish calumny directed against an officer of the General Government; so that a construction assuming the power of protecting the reputation of a citizen officer will extend to the case of any other citizen, and open to Congress a right of legislation in every conceivable case which can arise between individuals." 4 *The Writings of James Madison*, 332, 334 (Hunt ed. 1906).

In the course of his presentation Madison quoted the reply of Charles Cotesworth Pinckney, Elbridge Gerry and John Marshall, who later became Chief Justice of this Court, to the French Minister Talleyrand. Pinckney, Gerry and Marshall constituted the first of two missions which President John Adams sent to France. They wrote to Talleyrand:

> "The genius of the Constitution, and the opinion of the United States, cannot be overruled by those who administer the Government. Among those

> principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this *liberty* is often carried to excess; that it has sometimes degenerated into *licentiousness*, is seen and lamented, *but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is alive; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press they have never yet been devised in America.* No regulations exist which enable the Government to suppress whatever calumnies or invectives any individual may choose to offer to the public eye, or to punish such calumnies and invectives otherwise than by a legal prosecution in courts which are alike open to all who consider themseves as injured." 6 *Id.* at 336.

At the end of the year Madison prepared his *Report on the Resolutions of 1798*. Here he elaborated still more:

> * * * for, if the power to *suppress insurrections* includes a power to *punish libels*, or if the power to *punish* includes a power to *prevent*, by all the means that may have that *tendency*, such is the relation and influence among the most remote subjects of legislation, that a power over a very few would carry with it the power over all. And it must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or

exercised under the name of unlimited means of carrying into execution limited powers.

* * *

* * * Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. Nor can the wisdom of this policy be doubted by any who reflect that to the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the rights which conducted them to the ranks of a free and independent nation and which have improved their political system into a shape so auspicious to their happiness? * * * the article of amendment, instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged, was meant as a positive denial to Congress of any power whatever on the subject * * *

Is, then, the Federal Government it will be asked, destitute of every authority for restraining the licentiousness of the press and for shielding itself against the libellous attacks which may be made on those who administer it?

The Constitution alone can answer this question. If no such power be expressly delegated, and if it be not both necessary and proper to carry into execution an express power—above all, if it be expressly forbidden, by a declaratory amendment to the Constitution—the answer must be that the Federal Government is destitute of all such authority.

> The peculiar magnitude of some of the powers necessarily committed to the Federal Government; the peculiar duration required for the functions of some of its departments; the peculiar distance of the seat of its proceedings from the great body of its constituents; and the peculiar difficulty of circulating an adequate knowledge of them through any other channel; will not these considerations, some or other of which produce other exceptions from the powers of ordinary governments altogether, account for the policy of binding the hand of the Federal Government from touching the channel which alone can give efficacy to its responsibility to its constituents, and of leaving those who administer it to a remedy, for their injured reputations, under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties?" 6 *The Writing of James Madison*, 371, 389-393 (Hunt ed. 1906).

Jefferson in his letter of September 11, 1804 to Mrs. John (Abigail) Adams, the wife of his political opponent in the presidential campaign of 1800, and in his second inaugural address took the same position. 10 *The Works of Thomas Jefferson*, 89-90, 133-135 (Fed. ed. 1905); 8 *The Writings of Thomas Jefferson*, 311 (Ford ed. 1897); 4 *Memoir, Correspondence, and Miscellanies from the Papers of Thomas Jefferson*, 27 (Randolph ed. 1829). In his second inaugural Jefferson said that the abuses and licentiousness of the press were to be "corrected by the wholesome punishments reserved and provided by the laws of the several States against falsehood and defamation".

Other leaders among the founding fathers of this country took the same position. Among them were John Taylor of Caroline, Nathaniel Macon, Edward and William Liv-

ingston, and Albert Gallatin. See Smith, *Freedom's Fetters*, 131-155 (1956); Miller, *Crisis in Freedom*, 168-169 (1951); Schachner, *Founding Fathers*, 447-468 (1954). See also, Brandt, *James Madison Father of the Constitution*, 452-471 (1950). Taylor of Caroline gave an apt description of the Sedition Act of 1798 in his *An Inquiry Into the Principles And Policy of the Government of the United States* (New Haven, 1950). He said:

> "The design of substituting political for religious heresy, is visible in the visage of sedition laws. A civil priesthood or government, hunting after political heresy, is an humble imitator of the inquisition, which fines, imprisons, tortures and murders, sometimes mind, at others, body. It affects the same piety, feigned by priestcraft at the burning of an heretick; and its party supplies such exultations, as those exhibited at an auto da fe, by a populace." At 437.

The Sedition Act of 1798 expired by its own terms on March 3, 1801. The following day Jefferson said in his first inaugural: "If there be any among us who wish to to dissolve this Union, or to change its Republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." 9 *The Works of Thomas Jefferson*, 195-196 (Fed. ed. 1905).

No attack on the validity of the Sedition Act of 1798 reached this Court, but the better opinion today regards it as a violation of the First Amendment. See the dissenting opinion of Justice HOLMES in *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) ("I wholly disagree with the argument of the government that the 1st Amendment left

the common law as to seditious libel in force"), an opinion in which Justice BRANDEIS concurred; and the dissenting opinion of Justice JACKSON in *Beauharnais* v. *People*, 343 U. S. 250, 288 (1952). Justice Jackson commented:

> "* * * I think today's better opinion regards the enactment as a breach of the First Amendment and certainly Mr. Justice Holmes and Mr. Justice Brandeis though so."

President Woodrow Wilson in his 3 *History of the American People* declared that the Sedition Act of 1798 "cut perilously near the root of freedom of speech and of the press." At 153.

Thus on the first two great occasions when the question arose of the federal government punishing speech, namely at the time of the Sedition Act of 1798 and again in 1835-36 when President Jackson called for a law prohibiting the use of the mails for "incendiary publications" (Pet. Br. 18-21), the founders of this country, and their first successors, unequivocally took the position that such attempts violated the First Amendment. They had no doubt. The First Amendment meant just what it said: it absolutely prohibited Congress from making any law abridging freedom of speech or of the press.

B.

This Court Should Decline the Novel Role, Offered By the Government, to Develop a Catalogue of Values By Which to Measure the Respective Rights of Expressions to the Protection of the First Amendment.

What history denies to the government is not to be granted by the undiscriminating transportation of a dis-

torted version of Dean Pound's theory of balancing of interests into the realm of the First Amendment.

In order to prove that obscene writings are expressions entitled to little or no protection by the First Amendment, the government undertakes to suggest a catalogue of First Amendment values for various types of expression. What Bentham tried so valiantly but futilely to do for philosophy and Spinoza for ethics, the Solicitor General essays for the First Amendment. If this Court ever had any doubts that First Amendment expression could not be fragmented and then have varying values placed on its various forms like price-tags on cuts of meat, the chart on p. 29 of the government's brief should end those doubts. Before this Court assumes the impossible role, gratuitously offered by the government, as the appraiser of how much First Amendment currency shall be allowed each of the infinite forms expression can take, we would urge the position, which the government correctly characterizes as "simple and straightforward" (Br. 18), that expression unrelated to action subject to federal power is wholly and unexceptionally free under the First Amendment.

C.

The Government Has the Burden of Showing Both What the Substantive Evil Was and That the Danger of It Was So Clear and Immediate or Probable as to Justify Suppression of the Publications in Question.

Under the test in *Dennis* v. *United States*, 341 U.S. 494 (1951), and *Schenck* v. *United States*, 249 U.S. 47 (1919), there must be both a substantive evil and a probability that the publications in question will bring about that evil.

The government assumes that the publications in question, without more, established both parts: As a matter of fact they establish neither.

At the outset there is a fundamental difference between the instant case and the *Dennis* case in that in the *Dennis* case there was at least a statute, the Smith Act, which made the advocacy of the overthrow of any government in the United States by force or violence a crime. There is no comparable statute in the instant case. The government speaks "of inciting to criminal or perverted sexual conduct" (Br. 9). But there is no federal statute which provides that it is a crime to use the mails for the purpose of "inciting to criminal or perverted sexual conduct", and we submit that if there were such a statute it would not be constitutional. Moreover, as the petitioner has previously shown (Br. 30-33), there is no reliable evidence that so-called obscene publications or pictures have any appreciable effect on the conduct of human beings.

In addition, rather than publications causing some sort of sexual or other delinquency Professor Gellhorn has suggested that they may act as an emotional catharsis. After describing censorship as a nostrum rather than a remedy and observing that reliance on it will simply delay therapeutic and preventive steps that must be taken if youthful anti-social conduct is to be lessened, he makes the further point: "The offsetting *possibility* derives from the Aristotelian concept of emotional catharsis, shared now by many psychiatrists who believe that aggressions and frustrations that might otherwise flare into overt conduct are not fanned to flame but, instead, are more often dissipated, or at least made temporarily quiescent, by

reading." *Individual Freedom and Governmental Restraints* p. 64 (1956).

Other authorities are to the same effect. Dr. Benjamin Karpman, chief psychologist of Saint Elizabeth's Hospital in Washington, discusses the relation between reading and sexual action in his *The Sexual Offender and His Offenses* (1954), saying: "Contrary to popular misconception, people who read salacious literature are less likely to become sexual offenders than those who do not, for the reason that such reading often neutralizes what aberrant sexual interests they may have." At 485. See also Jahoda, *The Impact of Literature: A Psychological Discussion of Some Assumption In The Censorship Debate*, 37:40. (1954).

The government goes so far as to assert: "The common circulation of such material could hardly help but induce many to believe that their moral code was out of date and that they should do what, they suppose, others are doing". (Br. 60). We submit that this statement constitutes the sort of nonsense that we finally arrive at when the government decides to go into the business of censorship. We got along very well without obscenity statutes until about a century ago and we submit that we should all be better off if we went back to that approach today.

D.

Exclusion of the Federal Government from the Area of Obscenity, Pursuant to the First, Ninth and Tenth Amendments, Would Not "Open the Gates Wide" (Br. 39) as the Government Suggests, But Would Leave the Subject With the States Where It Belongs Under the Constitution.

The government concedes that there is "no question of the states having a reserved right to regulate obscene material in the United States mails", a view with which we agree, but then goes on to add: ". . . unless it is now found that the First Amendment prevents the Federal Government from doing so" (Br. 117).

Presumably the dire *caveat* of the government is based upon the line of cases following *Gitlow* v. *New York*, 268 U. S. 652 (1925), which applied the First Amendment to the states through the Fourteenth. It is, perhaps, appropriate to note that all this Court said in *Gitlow* v. *New York* was:

> "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the state." (268 U. S., at 666).

It is true that the quoted statement in *Gitlow* was taken by many to mean that the Fourteenth Amendment made the first eight Amendments applicable to state action. But as Justice Cardozo writing for the Court in *Palko* v. *Connecticut*, 302 U. S. 319, 323-325 (1937), and Justice Jackson in his dissenting opinion in *Beauharnais* v. *People*, 343

U. S. 250, 295 (1952), made plain, the only restraints upon state power imposed by the Fourteenth Amendment are those implied in the "concept of ordered liberty".

The applicable clause in the Fourteenth Amendment provides: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law"; that of the First Amendment: "Congress shall make no law". As Justice Holmes pointed out in his dissenting opinion in *Gitlow* the scope to be allowed to state action under the word "liberty" in the Fourteenth Amendment is of somewhat greater latitude "than is allowed to Congress by the sweeping language that govern, or ought to govern, the laws of the United States" (268 U. S., at 672).

In this connection it is significant that on other occasions Congress has provided for the transportation of material, the circulation or distribution of which various of the states prohibited. In the quarter of century before the Civil War, a federal statute made it a penal offense if any Postmaster should "unlawfully detain in his office any letter, package, pamphlet, or newspaper, with intent to prevent the arrival and delivery of the same to the person or persons to whom such letter, package, pamphlet or newspaper may be addressed or directed." Act of July 2, 1836 §32, 5 Stat. 87. Congress passed this Act after the failure of President Jackson's proposal for a law which would prohibit the use of the mail for what was then commonly referred to as incendiary publications. Yet, despite the federal act of July 2, 1836 the Southern States had various laws against the publication, reception, and distribution of incendiary matter.

Furthermore, in the rulings of the United States Attorney General; state laws obtained supremacy. In 1857

United States Attorney General Cushing ruled that a Mississippi statute forbidding delivery of incendiary matter was not in conflict with the federal law of 1836, and that no Postmaster was required to deliver material "the design and tendency of which are to promote insurrection". Similarly, in 1859 Postmaster General Holt ruled that a like Virginia statute did not conflict with federal law. To the postmaster at Falls Church, Virginia, he wrote that any postmaster might, after inspection of the mails, withhold delivery of any matter of "incendiary character." "The people of Virginia," he said, "may not only forbid the introduction and dissemination of such documents within their borders, but, if brought there in the mails, they may, by appropriate legal proceedings, have them destroyed." As quoted in Nye, *Fettered Freedom*, 69 (1949).

More recently, of course, there is the example of the federal government providing for the inter-state transportation of intoxicating liquors and yet assisting those states which have prohibition laws in the enforcement of such laws. See *James Clark Distilling Co.* v. *Western Maryland*, 242 U. S. 311, (1917). There is no difficulty in arranging for federal assistance in the maintenance of constitutionally permissible local standards.

But the government complains: "The Post Office could not have forty-eight standards of what was mailable" (Br. 117). We ask why not? We submit that such diversity is better than enforced conformity. We see no necessity for a federal Fair Morality Standards Act. Surely to let each state decide for itself concerning the morals of its inhabitants is better than to have one set of federal cultural officials in Washington or even one jury in any one community spoon-feed the whole American public on its

reading taste. See Justice Jackson's opinion for the Court in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943), and his concurring opinion in *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945).

III.

The Concept of Obscenity Is Not Sufficiently Definite So That One Can Tell With Reasonable Certainty Whether One Is Violating a Statute Proscribing It.

The government argues that the concept of obscenity is not as vague as petitioner has suggested. (Br. 104-105). We submit that the government is mistaken and that a few concrete examples will demonstrate this.

Certain issues of two nudist publications *Sunshine & Health*, and *Sun Magazine*, were held to be obscene by the Supreme Court in New York County, *Sunshine Book Co.* v. *McCaffrey*, 112 N. Y. S. 2d 476 (1952), but those same issues and others like them were held to be not obscene by the Federal District Court in the District of Columbia. *Sunshine Book Company* v. *Summerfield*, C. A. 3007-53, July 13, 1953 *aff'd* 221 F. 2d 42 (D. C. Cir. 1954) *cert. denied*, 349 U. S. 921 (1955). Yet another federal judge in the District of Columbia subsequently found other but similar issues of *Sunshine & Health*, and *Sun Magazine* to be obscene. *Sunshine Book Company* v. *Summerfield*, 128 F. Supp. 564 (1955), *reversed on appeal*, (C. A. D. C. No. 12622, May 31, 1956), subsequently reargued before the full bench and decision pending.

Erskine Caldwell's *God's Little Acre* was held obscene in Massachusetts [*Attorney General* v. *Book Named God's*

Little Acre, 326 Mass. 281, 93 N. E. 2d 819 (1950)], but not in New York [*People* v. *Viking Press*, 147 Misc. 813, 264 N. Y. S. 534 (1933)], or Pennsylvania [*Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101 (1949), *aff'd*, 166 Pa. Sup. 120].

Edmund Wilson's *Memoirs of Hecate County* was found obscene in *Doubleday & Co.* v. *People*, 335 U. S. 848 (1948), *aff'g*, 297 N. Y. 689, 77 N. E. 2d 6 (1947), and was found to be not obscene and therefore importable by administrative action of the Customs Service in California.

Lillian Smith's *Strange Fruit* was held obscene in Massachusetts, [*Commonwealth* v. *Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945)] but not in other jurisdictions. One can catalog many other similar instances.

As Professor Gellhorn pointed out the word obsenity "does not refer to a thing so much as to a mood. It is a variable. Its dimensions are fixed in part by the eye of the individual beholder and in part by a generalized opinion that shifts with time and place." *Individual Freedom and Governmental Restraints* 55 (1956).

Anne L. Haight, *Banned Books* (2nd ed.; Bowker, 1955), informs us, for example, that Jonathan Swift's *Gulliver's Travels* was "denounced on all sides as wicked and obscene" when it was published in 1726 (p. 36); in 1841 Shelley's publisher was convicted for publishing a collection of his works including such pieces as "*Queen Mab*" and "*Prometheus Unbound*" (p. 52); Walt Whitman's *Leaves of Grass* was denounced upon its publication and continued to encounter legal difficulties for years afterward (pp. 61-62); Tolstoi's *The Kreutzer Sonata* was banned by the Post Office Department in 1890, and Theodore

Roosevelt denounced the author as a "sexual and moral pervert" (p. 65); Thomas Hardy's *Tess of the D'Urbervilles and Jude of Obscure* had rough sledding in England (p. 67). One of America's foremost literary critics, Edmund Wilson, was held at the height of his career to have written an obscene novel.

A concept leading to such diverse and strange results should be abandoned, at least in the criminal field.

CONCLUSION

A consideration of the government's brief makes it plainer than ever that the federal obscenity statute, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, violates the First, Fifth, Ninth and Tenth Amendments. The judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted.

DAVID VON G. ALBRECHT,
DAVID P. SIEGEL,
O. JOHN ROGGE,
Attorneys for Petitioners.

On the brief:

PETER BELSITO
MURRAY A. GORDON
SIDNEY SILVERMAN

Office - Supreme Court, U.S.
FILED
MAY 14 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SPECIAL REPLY BRIEF FOR PETITIONER

DAVID VON G. ALBRECHT,
DAVID P. SIEGEL,
O. JOHN ROGGE,
Attorneys for Petitioner.

pointing up the unconstitutionality of this Act, is illustrative of his clarity of thought, great conscientiousness and industry.

He reverts to history and asks: "Should the First Amendment be interpreted in accord with the views prevalent among those who sponsored and adopted it, or in accord with subsequently developed views which would sanction legislation more restrictive of free speech and free press. He refers to Victorian morality and to its hypocrisy (2305).

Judge Frank states that "the short answer seems to be that the framers of the amendment knowingly and deliberately intended to depart from the English common law as to freedom of speech and freedom of the press." See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248-249; *Bridges* v. *California*, 314 U. S. 252, 264-265; *Patterson Free Speech and a Free Press* (1939) 101-102, 124, 125, 128; *Schofield, 2 Constitutional Law and Equity* (1921) 521, 525.

Judge Frank recognized that the Legislature has wide power to protect what it considers public morals. But the First Amendment severely circumscribes that power (and all other legislative powers) in the area of speech and free press.

Judge Frank indicated that subsequent punishment was practically prior restraint.

At 2308 the learned Judge said:

> "For a long time, much was made of the distinction between a statute calling for 'prior restraint' and one providing subsequent criminal punishment; the former alone, it was once said, raised any question of constitutionality vis-a-vis the First Amendment. Although it may still be true that more is required to justify legislation providing 'preventive' than 'punitive' censorship, this distinction has been substantially eroded. See, e.g. Dennis v. U. S., 341

U. S. 494; Schenck v. U. S., 249 U. S. 47; DeJonge v. Oregon, 299 U. S. 353; Thornhill v. Alabama, 310 U. S. 88, 97-98; Chaplinsky v. New Hampshire, 315 U. S. 568, 572 note 3. See also Hale, Freedom Through Law (1952) 257-265; Emerson The Doctrine of Prior Restraint, 20 Law & Contemp. Problems (1955) 648 (a thought-stirring discussion of the problem); Kalven, loc. cit. at 8-10, 13."

Judge Frank's opinion on this subject is backed up by even the New York Court of Appeals' (Fuld) opinion in *Brown* v. *Kingsley Books, Inc.*, which states:

"In point of fact, examination of the operation and effect of Section 22-a reveals substantially no greater interference with the freedom of the publisher or vendor than that presented by the possibility of punishment under the Penal Law. *There can be little doubt that the rigid enforcement of such penal provisions, though operating by indirection, may serve as effectually as direct action by injunction, if not more so, to deter publication of an obscene work* (see Pound, supra, 29 Harv. L. Rev. 640, 651; Emerson, supra, 20 Law and Contemporary Problems, at p. 660). *In the final analysis, the effectiveness of the injunctive remedy must itself depend upon punitive sanctions, by way of contempt proceedings, for its enforcement; and, if a publisher or vendor would not be deterred by the prospect of prosecution under the Penal Law, he might equally be unaffected by the threat of punishment for contempt.*"

An able article on prior restraints, 49 Columbia Law Review, draws the conclusion:

"Thus, to focus attention upon the form of the prohibition instead of its effect, is at best to substitute *maxim* for *reason*; at worst, it may lead to